Arbitrating War: Military Necessity as a Defense to the Breach of Investment Treaty Obligations

POLICY BRIEF

AUGUST 2013

PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH
HARVARD UNIVERSITY

ARBITRATING WAR:
Military necessity as a defense to the breach of investment treaty obligations

Ofilio Mayorga*

I. Introduction

Leading international law firms suggested that foreign investors could bring investment-treaty[1] claims against the government of Libya for losses sustained during the civil war of 2011.[2] Most of these claims would be based on the "protection and security" guarantee, which protects foreign investors against physical violence at all times, including during armed conflict.[3]

The protection and security guarantee is more robust than those protections investors and their assets would otherwise enjoy under humanitarian treaties in situations of war.[4] First, unlike protections accorded to civilians and civilian objects in international humanitarian law (IHL)[5], investors' rights under investment treaties can be directly enforced in international arbitral forums, such as the International Center for the Settlement of Investment Disputes (ICSID) or the International Court of Arbitration at the International Chamber of Commerce (ICC). In the event of losses arising out of the destruction of property, a foreign investor covered[6] by an investment treaty could seek compensation from the host State without the need to exhaust local remedies or without the intervention of his home State.[7] Victims of IHL violations do not have a comparable recourse under humanitarian law.[8]

Second, protection and security clauses impose upon host States an obligation to exercise due diligence in preventing harm against persons or property connected with an investment.[9] It follows that omissions or the failure to adopt all necessary measures to prevent damage – caused either by State organs or private actors - will invariably result in their breach.[10] During wartime, this standard of treatment requires State officials to "exercise restraint in the use of armed force where a protected investor is involved.[11]" The holding in *AAPL v. Sri Lanka* supports this proposition.[12] In that case, security forces attacked the premises of a shrimp farm that, according to government officials, had become a rebel base. The arbitral tribunal found that Sri Lanka's conduct fell below the standard of diligence required under the U.K/Sri Lanka Bilateral Investment Treaty (BIT)[13] because the losses could have been prevented through other peaceful means short of armed force. By contrast, the laws of war tolerate acts of violence against objects, including civilian property, that contribute to the military effort of enemy forces. Accordingly, the presence of insurgents at the farm could have rendered it a legitimate military target.[14]

---

* Legal Associate, Harvard Program on Humanitarian Policy and Conflict Research (HPCR). Email: omayorga@hsph.harvard.edu.

This policy brief argues that this standard of due diligence under protection and security clauses is inadequate to adjudicate investor-State disputes arising out of armed conflicts on at least two counts. First, it imposes significant constraints upon a State's right to use the degree and type of force necessary to subdue an enemy with the least expenditure of time, resources, and lives, under the principle of military necessity.[15] Second, the enforcement of these constraints may result in greater risks for investments operating in conflict zones for it encourages non-State armed groups (NSAGs) to use foreign-owned property to shield legitimate military objectives from attacks. Instead, I propose that the degree of diligence required in these cases should be determined by the modern law of armed conflict (LOAC), rather than the one articulated in *AAPL v Sri Lanka* and its progeny.[16]The LOAC is the most appropriate legal framework to better assess the competing interests and policies at stake in disputes of this nature because its rules strike a balance between military necessity and humanitarian considerations. This balance allows States to prosecute a war effectively, while mitigating its adverse effects on the civilian population –including foreign investors- at the same time.

Along this line of reasoning, I submit that States may validly raise military necessity as a defense to claims of violations of the protection and security guarantee, especially in cases of property destruction from targeting operations by government forces. My goal is to provide decision-makers both in the humanitarian and arbitration fields with a workable legal methodology to incorporate IHL analysis in investment treaty arbitration. This methodology is based on a model of "systemic integration" in international law that seeks to mitigate potential conflicts between norms originating in different legal regimes. Thus, this brief advances a theory to incentivize the concurrent operation of both investment treaties and the laws of war rather than the application of one at the expense of the other.

This brief proceeds as follows: Section II discusses the *AAPL v Sri Lanka* arbitration to illustrate the tensions between the LOAC and Investment Law in investor-State disputes, particularly in targeting operations. Section III proposes a methodology for incorporating the LOAC into treaty disputes. It not only addresses the relationship between the LOAC and protection and security clauses, but also between the LOAC and other investment treaty provisions, such as so-called "war clauses" and the "non-precluded measures" (NPM) clauses. To be sure, the incorporation of the LOAC in investor-States disputes may require the watering down of substantive investment protections; however, I conclude that relying upon the LOAC enhances the legitimacy of the investment treaty regime in the eyes of contracting States, thus strengthening rather than weakening the rights of foreign investors in the long run.

II. Investment protections in times of war

a. AAPL v Sri Lanka revisited

The question before the *AAPL* panel was whether Sri Lanka had breached the "full protection and security" clause of the Sri Lanka/U.K BIT as a result of the destruction of a shrimp farm in the course of a military operation against Tamil tigers in 1987.

The government of Sri Lanka justified the attack on the basis that the farm was being "used by Tiger rebels as a base of operations and support". Security officials also believed that the staff and senior managers were supporting the rebels. The claimant – a company based in Hong Kong- denied that the farm was a "terrorist facility" and that the loss of property and the "execution" of 21 employees could have been prevented through peaceful measures short of armed force, especially considering that the company had pledged to cooperate with the government to make sure the farm was not infiltrated by rebels.

After reviewing the evidence, the tribunal reasoned that the question of liability could only be resolved by determining whether or not the security forces were in a position to prevent the losses under the circumstances. It held that:

> "…the governmental authorities should have undertaken important precautionary measures to get peacefully all suspected persons out of Serendib's farm before launching the attack, either through voluntary cooperation with the Management of the company or by ordering the company to expel the suspected persons."

In response to Sri Lanka's concerns in regard the staff's alleged complicity with the Tamil tigers, the tribunal went on to say:

> "If this had been effectively the case… the legitimate expected course of action against those suspected persons would have been either to institute judicial investigations against them to prove their culpability or innocence, or to undertake the necessary measures in order to get them off the Company's farm."

These precautionary measures short of armed force would have been "essential", in the tribunal's words, in preventing the killings and destruction of assets when planning the military operation. Thus, Sri Lanka was found liable as a result of this omission.

In his dissent, Samuel Asante rejected the *AAPL* award on the basis that the tribunal evaluated the conduct of the Sri Lankan security forces against a standard of liability more appropriate to situations less serious than armed conflict, such as cases of mere banditry or sporadic civil disturbances. According to Asante, the majority opinion was insensitive to the security needs of a sovereign government trying to reestablish its authority over territory lost to rebels. Furthermore, Asante regretted that Sri Lanka was held liable for "incidental" killings or destruction. In his view, the loss of life and property was permissible under the circumstances.

The rationale underlying Assante's dissent is not unfamiliar to military lawyers: he articulated a defense based on the principle of military necessity[17] that permeates humanitarian law. Yet the tribunal did not refer to the LOAC. To be fair, its applicability may not have been that obvious in 1990, when the final award in *AAPL v Sri Lanka* was rendered. First, Sri Lanka did not expressly raise a defense under the LOAC.[18] Second, the law of non-international armed conflicts was not as developed then as it is today.

Thanks to the ICRC's 2005 study on Customary International Humanitarian Law[19] and the vast body of case law produced by the international ad-hoc criminal tribunals of Rwanda and the Former Yugoslavia, many of the rules governing international armed conflicts (IACs) have filled the gaps in the scant provisions dedicated to non-international armed conflicts (NIACs) in humanitarian treaties.[20] Additionally, the *AAPL* panel was not convinced that the farm was being used as a rebel base. That finding alone may have been more decisive in the outcome of the case than the applicable law.

b. The LOAC and the principles of targeting

At any rate, the AAPL panel's preference for judicial proceedings to capture the rebels rather than kill them clashes with a State's prerogatives under the laws of war. Had Sri Lanka acted pursuant to the peaceful measures the tribunal suggested, the military operation to incapacitate Tiger rebels could have been frustrated. This result is not optimal during wartime because military necessity permits belligerents to use lethal force and attack lawful targets, including members of armed groups, so long the principles of distinction, proportionality, and precautions are observed.

i. The principle of distinction

The principle of distinction requires the parties to a conflict to distinguish between the civilian population and combatants, and between civilian objects and military objects, in the course of military operations. Pursuant to this principle, attacks may only be directed at lawful targets, which are limited to: 1) combatants; 2) civilians directly participating in hostilities; and 3) military objectives. Therefore, attacks against civilians and civilian objects are prohibited.[21]

Combatants are members of the regular armed forces of a belligerent State, including militias and volunteer corps forming part of such forces.[22] Combatants do not have immunity from attack, except when they are placed out of combat due to sickness, wounds, or capture, and may be targeted at all times. The notion of "combatant" is exclusive to international armed conflicts. Civilians directly participating in hostilities, on the other hand, are fighters who participate in a conflict on an individual basis and lose their immunity from attacks, but only for such time they participate in hostilities.[23] This category of individuals exists in both international armed conflicts and internal conflicts. Disagreement exists as to whether members of non-state armed groups (NSAGs), such as the LTTE in Sri Lanka, are to be treated as civilians directly participating in hostilities, or as a category of individuals analogous to members of the armed forces of a State. If the former, members of NSAGs are targetable only during such time they participate in hostilities; if the latter, they are targetable at all times. [24]

Military objectives are those objects that effectively contribute to military action.[25] The LOAC provides four criteria to determine whether an object fulfills this requirement:

- **Nature**: Objects such as military aircraft, tanks, missiles, weapons, airfields, military facilities and barracks are examples of military objectives that satisfy the

"nature" criterion. These objects constitute lawful targets even when not in use for they possess inherent characteristics that enhance a belligerent's ability to inflict substantial damage upon the opponent's military capabilities.

- **Location**: Specific areas of land or infrastructure, which do not have any military function, may become legitimate military objectives by virtue of their location. Classical examples of objects whose location render them targetable under the LOAC are mountain passes, bridgeheads, or jungle trails which provide enemy forces with a route of retreat during hostilities.[26] Therefore, it is lawful to destroy or disable these objects even before being used by the opponent.

- **Purpose**: Plans to use any objects, including civilian objects, for military purposes will render such objects liable to attacks. Thus, the criterion of "purpose" relates to the intended future use of an object regardless of its present function. For instance, it would be legal to target a civilian airport likely to be used as an alternative recovery airfield in the event that military airfields in the area are destroyed.[27]

- **Use**: Civilian objects may become military objectives due to its present use by enemy forces.[28] Thus, a restaurant used to store weapons or to launch rockets will be converted into a military objective during the time of that use and while the individuals participating in hostilities remain in the premises.

Moreover, the destruction and neutralization of a military objective must confer the attacker with a definitive military advantage. According to the commentary on the HPCR Air Missile Warfare manual, military advantage in this context should be understood "as any consequence of an attack which directly enhances friendly military operations or hinders those of the enemy. This could, e.g., be an attack that reduces the mobility of the enemy forces without actually weakening them, such as the blocking of an important line of communication."[29]

ii. Proportionality

Compliance with the principle of distinction does not guarantee the civilian population complete safety against the effects of war, especially in situations where military objectives are located in proximity to civilians and civilian objects, or where civilians are located within a military object. Although the LOAC tolerates injury or damage to non-military targets in some circumstances, attacks expected to cause "collateral" or "incidental" damage which would be excessive in relation to the military advantage anticipated are prohibited.[30]

iii. Precautions

To minimize the chances of civilian losses and damage, the LOAC imposes a duty of "constant care" upon belligerent parties before launching an attack.[31] This duty of care is observed through the following precautionary measures[32]:

- Each party to the conflict must do everything feasible to verify that targets are military objects.

- Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

- Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

- Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

- Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.

- When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

III. Incorporating the LOAC into investment treaty arbitration

a. A normative conflict: Investment Treaties v the law of targeting

Assuming, for example, that the shrimp farm in *AAPL* was being used to store weapons or plan future operations, this would have been enough to satisfy the "use" criterion to convert a civilian object into a lawful target. According to Assante's dissent, 12 members of the official security forces were blown up by a mine buried just a few miles from the farm on the same day of the military raid. Additionally, the Tiger rebels established headquarters in a village 1.5 miles south of the southern border of the farm since 1986. The proximity of rebel activity to the area confirms that control of the farm conferred a strategic and tactical advantage. Because the Sri Lankan government had lost control of the area in previous months, it was also reasonable for the company to tolerate rebel activity to continue operating. But the *AAPL* tribunal was not convinced that the farm was indeed a rebel base. Even if that were the case, the presence of rebels in the farm arguably rendered the destruction of the farm permissible "collateral damage" by virtue of the proportionality rule.

To defend itself from an investment claim, a State may raise the defense of military necessity under the LOAC as an exception to the obligation to accord full protection and

security. An arbitral tribunal would be confronted with a normative conflict[33] for the application of the law of targeting and the protection and security standard to the same set of facts is likely to yield opposite results.[34] While "protection and security" clauses in investment treaties limit a State's right to use force when targeting operations may affect an investment, as shown in the *AAPL* arbitration, military necessity eases such restraint by granting the parties to a conflict the ability to inflict a certain degree of injury, death, or destruction.

b. The principle of "systemic integration"

Rather than applying one set of norms to the exclusion of the other, this conflict can be avoided through a method of "systemic integration" that promotes complementarity between opposing norms. The benefit of integrating IHL and investment treaties is twofold: First, it ensures that investment tribunals retain jurisdiction to hear investor-State disputes in wartime.[35] And second, it allows arbitrators to judge State conduct on the basis of the rules and expectations that inform the conduct of military professionals on the battlefield.[36]

This method is sanctioned by article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which requires treaties to be interpreted together with other "relevant rules of international law applicable in the relations between the parties."[37] Indeed, the ICJ followed a similar solution in the Nuclear Weapons case to determine the scope and content of the human right to life, as codified in the International Covenant on Civil and Political Rights (ICCPR), in times of armed conflict. The court held:

> "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."[38]

Similarly, the degree of diligence required by the full protection and security standard in wartime can only be discerned by reference to the laws of war. In deciding whether the destruction of foreign-owned property by government forces constitute a breach of the protection and security standard, an investment tribunal must examine official conduct against the background of the principles of distinction, proportionality, and precautions prescribed by the LOAC. This is possible because investment treaties do not operate in isolation from other rules of international law. As the *AAPL* majority opinion put it:

> "…the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide the substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to

certain supplementary rules, whether of international law character or of domestic law nature."[39]

In other words, we should look at an investment treaty as the legal instrument that spells out the rights and obligations of the parties in an investor-State dispute, "whereas the rules of international law would in any event constitute the 'law applicable' to the determination, creation, scope, modification, extinction, interpretation, and operation"[40] of such rights and obligations. To better illustrate this point, Yas Banifatemi equates an investment treaty to a contract, whereby "the proper law of the contract is not the contract but the legal system in which the contract finds its validity."[41] Thus, the applicable law in investor-State disputes under an investment treaty is not the terms of the treaty itself, but the system of international law that validates it.

Because the laws of war are part of that system of international law where investment treaties operate, and given that States conduct hostilities on the basis of the expectations created by the LOAC, protection and security clauses must be interpreted by reference to the LOAC. Accordingly, the defense of military necessity is available to States facing claims of breaches of investment protections in times of armed conflict.[42]

c. Beyond protection and security: "War" and "NPM" clauses in investment treaties

In addition to the protection and security guarantee, some investment treaties contain so-called "war" clauses[43] and "non-precluded measures" (NPM) clauses[44] that may be relevant in determining State responsibility for the destruction of foreign-owned property during wartime.

War clauses require the host State, *inter alia*, to compensate a foreign investor for the destruction of property by government forces in cases of war, armed conflict, state of emergency, revolution, insurrection, civil disturbance, or similar events, unless said destruction was not required by the necessity of the situation. In case of armed conflict, the decision of whether the destruction of property was required or not by the necessity of the situation must be made on the basis of the LOAC and the notion of military necessity. This means that the destruction of a civilian object that by virtue of its location, purpose, or use becomes a military objective does not result in the violation of an investment treaty. The same goes for "incidental" losses sustained in the course of military operations unless the claimant proves they were excessive in relation to the military advantage gained or that the security forces of the host State did not do everything feasible to minimize the damage as required by article 57(2) of API.

NPM clauses, on the other hand, allow States to adopt measures "necessary" for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. Although States have invoked this clause primarily in times of economic emergency[45], the reference to "public order" and "essential security interests" arguably covers measures to curb an insurgency or internal armed rebellion, including the

targeting of combatants and military objectives. Accordingly, the successful invocation of a NPM clause will exclude the operation of the protection and security standard in favor of the investor. As in the case of "war" clauses, what is necessary for the maintenance of public order or the protection of security interests can be determined by reference to the LOAC.

IV. Conclusion

Arbitral practice shows that claims for the breach of protection and security clauses are likely to be successful if the State fails to take all necessary measures to prevent physical harm against an investment. The application of this standard in wartime is unsound as a matter of policy because it may encourage members of non-State armed groups (NSAGs) to use civilian objects, in this case foreign property, to shield legitimate military targets from attacks. This result, which constitutes a significant threat to foreign investments operating in conflict zones, can be prevented by reference to the principle of military necessity codified in the LOAC.

The incorporation of the LOAC into investment arbitration provides arbitrators with the tools to balance the security and operational needs of States and official security forces on the ground, and the interests of foreign investors. To be sure, not all investment losses occurring in armed conflict will require compensation. Yet, investors can expect to be protected against wanton or unnecessary destruction caused by State officials. Failure to take account of the LOAC may exacerbate the common perception that the investment treaty regime is skewed in favor of the investors.[46] This not only affects the legitimacy of the investment regime but it also gives States a viable excuse to withdraw or suspend their commitments to protect investors in all circumstances.

With more than 3,000 investment treaties in force, the potential for investor-State disputes arising out of armed conflicts cannot be dismissed. The threat of an international dispute for acts carried out in wartime should be a significant consideration for military planners and their lawyers before launching an attack. For example, what evidence or intelligence should be preserved to prove military necessity or that an attack was directed against a legitimate military target? A State may also want to make sure that there is at least one military expert in the arbitral panel. With respect to the foreign investor, it is important to understand the chances of success in a potential dispute before bringing a claim, especially if the dispute will be decided on the basis of the LOAC. At any rate, it is expected that in case of an investment dispute of this nature, the investor will resist the watering down of investment protections through the interpretation of investment treaties by reference to the LOAC.

The humanitarian community should also increasingly consider how the investment treaty regime can help enforce humanitarian norms, and ultimately, whether it offers an alternative avenue, albeit limited, for the protection of civilians in armed conflict.

Program on Humanitarian Policy and Conflict Research
Harvard University
14 Story Street, 2nd Floor
Cambridge, Massachusetts 02138, USA
Ph: (617) 384-7407 ◆ Fax: (617) 384-5908
hpcr@hsph.harvard.edu
www.hpcrresearch.org

[1] Investment treaties are international legal instruments entered into by two or more States to protect the economic interests of their nationals in foreign territories. Each contracting party undertakes to provide investors from other countries with legal protection against arbitrary or unreasonable measures, including expropriation without fair compensation, discrimination based on national origin, or failure to prevent physical harm. These agreements include Bilateral Investment Treaties (BITs), regional economic agreements such as NAFTA and DR-CAFTA, and Free Trade Agreements (FTAs). The first BIT was concluded in 1959 between Germany and Pakistan. Today there are more than 3,000 investment treaties in force. *See, e.g.,* "The Increasing Appeal and Novel Use of Bilateral Investment Treaties", *Skadden, Arps, Slate Insights*, 29 April, 2013. Available at:http://www.skadden.com/insights/increasing-appeal-and-novel-use-bilateral-investment-treaties.

[2] *See*, e.g., "Crisis in Libya: What legal options are available to oil and gas companies?", *King and Spalding LLP Client Alert*, 17 May, 2011. ("[International Oil Companies] and contractors with operations in Libya can claim that the government has violated these treaty standards by engaging in a campaign of hostility and violence and by committing other acts and omissions that have resulted in an untenable, unstable, and unpredictable investment environment.") Available at: http://www.kslaw.com/imageserver/KSPublic/library/publication/ca051711.pdf. *See* also "Investments in Libya: Potential Claims under Bilateral Investment Treaties and Political Risk Insurance Policies", Freshfields Bruckhaus Deringer LLP, Briefing, March 2011; "Civil Unrest and Sanctions: Implications for Investors in Lybia', *Allen & Overy*, 21 March 2011; "New Business Opportunities Expected, but are Troubling Times also ahead for Investors in Lybia?", *Fulbright & Jaworsky Briefing*, 6 September 2011.

[3] *See, generally,* Christoph H. Schreuer, "The Protection of Investments in Armed Conflict", Transnational Dispute Management (TDM) 3, 2012. Available at: http://www.univie.ac.at/intlaw/wordpress/pdf/Armed%20Conflict.pdf. In fact, the first investor-State dispute ever brought under a BIT arose out of the destruction of foreign property during wartime. *See Asian Agricultural Products Ltd v Sri Lanka*, ICSID case No ARB/87/3 (final Award) 30 I.L.M. 580 1991.

[4] For an authoritative study on the protection of businesses in humanitarian law *see,* "Business and International Humanitarian Law: an introduction to the rights and obligations of business enterprises under international humanitarian law", International Committee of the Red Cross (ICRC report), September 2006, available at: http://www.icrc.org/eng/resources/documents/publication/p0882.htm.

[5] I use the terms international humanitarian law (IHL), the laws of armed conflict (LOAC), and the laws of war, interchangeably, to describe the rules that govern the conduct of belligerents during armed hostilities.

[6] Investment treaty protections are extended to investments of nationals or companies from a contracting State (State of origin) in the territory of another contracting State (host State). There is no universal definition of the term "investment", but it usually includes: shares or other forms of participation in local companies or associations whether or not for profit, real and contractual property rights, intellectual property rights, bonds and concession contracts. In order to bring an investment claim, an investor must fulfill the nationality requirement and show that the dispute arose in connection to an investment, as defined in the relevant treaty.

[7] According to the American Lawyer's Arbitration Scorecard 2013, between 2011 and early 2013, there were 165 known pending treaty arbitrations where the amount in dispute was $100 million or more. *See* http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202607030938.

[8] *See, generally,* "Reparation for Civilians Living in the Occupied Palestinian Territory (OPT): Opportunities and Constraints under International Law", Harvard Program on Humanitarian Policy and Conflict Research, Policy Brief, May 2010. ("Thus, the truth of the matter is that IHL, while arguably affirming that victims of IHL violations have a conceptual right to compensation, does not take that one step further to actually allow victims to enforce that right.") Available at: http://www.hpcrresearch.org/sites/default/files/publications/Reparation%20for%20Civilians%20Living%20in%20the%20OPT%20--%20May%202010_0.pdf.

[9] The text of protection and security clauses in investment treaties varies from treaty to treaty but the normative content is similar. Here is an example of a protection and security clause from the BIT between Libya and Austria: "Article 3. Treatment of Investments. (1) Each contracting party shall accord to investments by investors of the other contracting party fair and equitable treatment and *full and constant protection and security*." Emphasis added. Available at: http://unctad.org/sections/dite/iia/docs/bits/austria_libya.pdf.

[10] *See, e.g., Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, paras. 483, 484. ("The 'full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical violence… the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically *the physical integrity of an investment against interference by use of force*.") Emphasis added.

[11] Christoph H. Schreuer, *supra n.* 3 at p. 9.

[12] *Ibid.*

[13] The Sri Lanka-United Kingdom Agreement on the Promotion and Protection of Investments (1980) 19 ILM 886.

[14] *See, e.g.,* ICRC report, supra n. 4 at p. 17. ("Business enterprises' property such as factories, offices, vehicles, land and resources are considered civilian objects and thus also benefit from the protection against deliberate and indiscriminate attacks. However, if business property is used for military purposes, it becomes a military object and risks being legitimately attacked by parties to the conflict.")

[15] *See* i*nfra* n. 17.

[16] *See, e.g., American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4; *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006; and *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican* ICSID Case No. ARB (AF)/00/2.

[17] Military necessity allows belligerents to employ all necessary measures to defeat the enemy. It follows that wanton or unnecessary destruction is prohibited. The Lieber Code defined this

principle as follows: “Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God." See Articles 14 and 15 of Lieber Code at: http://www.icrc.org/ihl.nsf/0/a25aa5871a04919bc12563cd002d65c5?OpenDocument.

[18] States usually deny the existence of an internal conflict to avoid the intervention of the international community, as well as to ignore their obligations under IHL. In fact, the Sri Lankan government did not let the Red Cross to open an office in the country until 1989 for fears that doing otherwise would be an admission of the existence of a civil war. *See, e.g.,* Mary Ellen O’Connell, “Humanitarian Assistance in Non-International Armed Conflict, The Fourth Wave of Rights, Duties and Remedies”, 31 ISRAEL YEARBOOK ON HUMAN RIGHTS 183 (2001) at 195.

[19] Jean-Marie Henckaerts and Louise Doswald-Beck, “Customary International Humanitarian Law, Volume 1: Rules”, ICRC, 2005. (ICRC 2005 Study) Available at: http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf.

[20] The Geneva Conventions of 1949 and their additional protocols dedicate 527 articles to the regulation of IACs, while only 29 to NIACs. But the growth of customary humanitarian law in recent decades has closed this gap. For instance, the rules of targeting applicable to IACs are almost identical to those pertaining to NIACs, even if targeting is not expressly regulated in treaties that regulate the conduct of hostilities in internal conflicts. Therefore, the principles of distinction, proportionality, humanity, and precautions that permeate the law of targeting are applicable in both IACs and NIACs.

[21] Article 48 of the Additional Protocol I (API) to the Geneva Conventions of 1949 reads as follows: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

[22] *See* Article 4 of the 1949 Geneva Convention III relative to the treatment of prisoners of War (“POW Convention”).

[23] *See* Article 51 (3) API and Article 13 (3) of the additional protocol II to the Geneva Conventions of 1949 (APII).

[24] According to professor Michael Schmitt, members of organized armed groups can be targeted at all times. *See, generally,* Michael N. Schmitt, “The Status of Opposition Fighters in a Non-International Armed Conflict”, International Law Studies, Volume 88, at 137 (“… there is no

LOAC prohibition on attacking members of organized armed groups at any time, just as there is no international law prohibition on attacking members of the government's forces.")

[25] Art. 52(2) of API provides as follows: "Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

[26] *See* Article 22(b) of the HPCR Manual on Air Missile Warfare and its commentary. Available at: http://www.ihlresearch.org/amw/manual/.

[27] *Ibid*, Article 22(c) and commentary.

[28] *Ibid*, Article 22(d) and commentary.

[29] *Ibid*, Article 1(w) and commentary.

[30] Article 57 2(b) of API.

[31] Article 57(1) of API.

[32] These precautionary measures are listed in rules 15-21 of the ICRC 2005 Study, *supra n*. 19.

[33] *See, e.g.,* M. Milanovic, "A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law", Journal of Conflict & Security Law (2010), Vol. 14 No. 3, 459, 465 ("Broadly, a relationship of conflict exists between two norms if one norm constitutes, has led to or may lead to, a breach of the other.")

[34] In a recent article, Heather L. Bray suggests that the application of the full protection and security standard in wartime is a point of intersection, rather than conflict, between IHL and foreign investment law. *See*, *generally*, Heather L. Bray, "SOI- Save Our Investments! International Investment Law and International Humanitarian Law", The Journal of World Investment & Trade 14 (2013) 578-594.

[35] The International Law Commission (ILC) formulated and defended this principle of systemic integration in the 2006 report on the fragmentation of international law. According to the Commission, an international tribunal can rely upon this method to reach beyond the "four corners" of the particular instrument that confers it with jurisdiction to hear the dispute. In the case of investment tribunals, this means that they may apply and interpret investment treaties in relation to their normative environment, which include other regimes of international law. See, ILC, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission", (Finalized by M. Koskenniemi) UN Doc A/CN.4/L682, 13 April 2006, para. 410-423.

[36] *See, e.g.*, DAVID KENNEDY, OF LAW AND WAR, 102 (2006). ("Military professionals the world over are emboldened by the confidence that what they do on the battlefield, in war, should

be judged by different standards, tested by different rules, than what they do at home with their families, when their communities are at peace.")

[37] Vienna Convention of the Law of Treaties (VCLT) 1969, 1155 UNTS 331, Art. 31(3)(c).

[38] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (1996) ICJ Rep 226, para. 25.

[39] *AAPL v Sri Lanka*, supra n. 3, p. 587.

[40] Yas Banifatemi, "The Law Applicable in Investment Treaty Arbitration (Chapter 9)", in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Katia Yannaca-Small (ed.), Oxford University Press, 2010.

[41] *Ibid*.

[42] The use of other legal regimes in treaty arbitration is not novel. In Continental *Casualty v. Argentine Republic,* an investment tribunal reached to international trade law to interpret a provision of the BIT between Argentina and the U.S. *See*, Continental Casualty v. Argentine Republic, ICSID case NO. ARB/03/9, award (September 5, 2008) p. 192 ("The tribunal is thus faced with the task of determining the content of the concept of necessity in Art. XI… Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity…, rather than to refer to the requirement of necessity under customary international law.")

[43] Article 5 of the Bilateral Investment Treaty (BIT) between Libya and Austria provides an example of a war clause: "**Compensation for losses:** (1) An investor of a Contracting Party who has suffered a loss relating to its investment in the territory of the other Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event, or acts of God or force majeure, in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third state, whichever is most favourable to the investor. (2) An investor of a Contracting Party who in any of the events referred to in paragraph (1) suffers loss resulting from: (a) requisitioning of its investment or part thereof by the forces or authorities of the other Contracting Party, or (b) destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation, shall in any case be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article 4 (2) and (3)."

[44] Article XI of the U.S.-Argentina BIT is an example of a NPM clause: "**ARTICLE XI:** This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

[45] Argentina turned to the NPM provision of the U.S.-Argentina BIT to defend itself against investment claims arising from the measures adopted during the economic crisis of 2001. *See, generally,* William W. Burke-White and Andreas von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", (2008) 48 Virginia Journal of International Law 307.

[46] *See, e.g.,* Pia Eberhardt & Cecilia Olivet, "Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom", Corporate Europe Observatory and the Transnational Institute, November 2012. Available at: http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf.